IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 12, 2007 Session

MELONY GORDON v. W.E. STEPHENS MANUFACTURING COMPANY, INC.

Appeal from the Circuit Court for Davidson County
No. 05C-2389 Barbara Haynes, Judge

No. M2007-01126-COA-R3-CV - Filed September 16, 2008

Employee appeals from a directed verdict in a sexual harassment action under the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq*. Employee sued her employer alleging that sexual harassment by her immediate supervisor created a hostile work environment. The case proceeded to trial before a jury. After the close of defendant's proof, the trial court granted a directed verdict in favor of defendant-employer. Employee appeals challenging the legal standard used to weigh the evidence at trial and arguing against employer's assertion of the *Faragher/Ellerth* affirmative defense. We find the material evidence presented at trial created fact questions by which a jury could reasonably find in favor of plaintiff-employee. Therefore, the trial court erred in taking the case from the jury on a directed verdict. Judgment of the trial court is vacated and the case is remanded for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and JON KERRY BLACKWOOD, SP.J., joined.

Justin S. Gilbert and Michael L. Russell, Jackson, Tennessee, for the appellant, Melony Gordon.

Anne C. Martin and Marshall T. Cook, Nashville, Tennessee, for the appellee, W.E. Stephens Manufacturing Company, Inc.

OPINION

The plaintiff-employee appeals from a directed verdict on a claim of sexual harassment against her employer alleging the actions of her immediate supervisor created a hostile environment. A directed verdict may be granted only if "'reasonable minds could not differ as to the conclusions to be drawn from the evidence'" as viewed in favor of the opponent. *Alexander v. Armentrout*, 24

S.W.3d 267, 271 (Tenn. 2000) (quoting *Eaton*, 891 S.W.2d at 590). We review a trial court's disposition of a motion for a directed verdict under the same standard the trial court must use in making that decision and do not reweigh the evidence on appeal. *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006); *Pettus v. Hurst*, 882 S.W.2d 783, 788 (Tenn. Ct. App. 1993). Likewise, we do not resolve disputes in the evidence or evaluate the credibility of witnesses. *Richardson v. Miller*, 44 S.W.3d 1, 30 (Tenn. Ct. App. 2000). Rather, we must take the strongest legitimate view of the evidence in favor of the party opposing the motion. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994); *Goodale v. Langenberg*, 243 S.W.3d 575, 582 (Tenn. Ct. App. 2007) (perm. app. denied Nov. 19, 2007); *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d 364, 370 (Tenn. Ct. App. 2005). Therefore, in the following factual background and summary of the evidence, we consider the evidence in the light most favorable to the employee.

BACKGROUND

W. E. Stephens Manufacturing Company ("Stephens") is an apparel manufacturing and design company that primarily imports its products for sale to department stores and private retailers. It operates a number of foreign manufacturing facilities, including a plant in the Dominican Republic, and leases space at the Kenco warehouse in LaVergne, Tennessee. Melony Bruce Gordon began working for Stephens in January 1994 as an operator of industrial printing machinery. In 1997, Ms. Gordon was promoted to Stephens' Quality Control (QC) Department and completed her training at Stephens' corporate headquarters in Nashville where she met and worked with John Williams.

Mr. Williams began working for Stephens in 1993 as the plant manager of a sewing facility in Pulaski, Tennessee, overseeing approximately 150 employees. Mr. Williams then became Stephens' quality control manager and was Ms. Gordon's immediate supervisor for ten years. During this time, Ms. Gordon and Mr. Williams developed a close working relationship and personal friendship. It is undisputed that both Ms. Gordon and Mr. Williams were valuable and hard working employees.

In 2005, Ms. Gordon worked primarily at Stephens' Kenco facility in the quality control lab adjacent to the warehouse. Mr. Williams regularly traveled to various Stephens facilities and made weekly visits to Kenco. In January 2005, Mr. Williams was visiting Stephens' plant in the Dominican Republic. During this trip, he called Ms. Gordon, purportedly regarding business matters. During the course of the conversation, Mr. Williams told Ms. Gordon that he had a dream about her and said she "looked good without [her] clothes on" and "wore him out all night and he couldn't wait to go to bed hoping he would have another dream like that."

Ms. Gordon testified that she was extremely disturbed by the sexual nature of the phone call and that the nature of her relationship with Mr. Williams changed after January. According to Ms. Gordon, Mr. Williams started visiting the Kenco facility more often once he returned from the Dominican Republic, sometimes as many as three to four times a week. He repeatedly touched Ms. Gordon on her back, stroked her hair, and began making comments about how she smelled and what

she was wearing. Ms. Gordon described one instance in particular: "I was going through the file cabinet - - the files one morning when [Mr. Williams came] in. He come [sic] through the door and the first thing out of his mouth was 'Look, Melony's on her knees already this morning.'"

Mary Katherine Crotts was a temporary employee who worked at Stephens regularly for nearly four years. Ms. Gordon was Ms. Crotts' supervisor in 2005 at the Kenco plant. Ms. Crotts testified that, beginning in January 2005, she noticed Mr. Williams started coming to the Kenco plant nearly every day whereas he previously only visited the plant once a week to pick up timesheets. Ms. Crotts testified that she saw Mr. Williams stroking Ms. Gordon's hair and rubbing her back and that she could tell it made Ms. Gordon very uncomfortable. She stated that Ms. Gordon would physically tense up and try to pull away from him.[1]

On the days Ms. Gordon knew Mr. Williams would be coming to the Kenco plant, she would create a barricade around her work space by stacking boxes and placing carts around her table to keep him away. Ms. Crotts witnessed Ms. Gordon barricade herself in: "She was like almost in a – not really in a corner, but she would sort of corner herself in with boxes, carts, really anything she could get her hands on that would keep him from getting so close to her as he liked to do." Ms. Crotts said she witnessed this reaction every time Mr. Williams was around Ms. Gordon. She also heard Mr. Williams say to Ms. Gordon things like: "Boy, you sure do look good today;" "Don't you look good in those shorts;" and "Are you gaining weight? Your butt sure is looking good."

In June 2005, Mr. Williams asked Ms. Gordon to pull certain invoices so he could review them at Kenco. Concerned about being alone with Mr. Williams, Ms. Gordon called Jim Clark, Stephens' controller, on June 28, 2005, to complain about Mr. Williams. Ms. Gordon also called Connie Blevins, Stephens' Customer Service Manager. It is undisputed that Ms. Gordon did not alert Stephens to her concerns until June 28, 2005. Ms. Gordon testified that she did not report Mr. Williams in the six months following the phone call because she was afraid of losing her job.

Mr. Clark met with Ms. Gordon on the morning of June 29, 2005. Mr. Clark drafted a memorandum the same day in which he summarized the sequence of events and Ms. Gordon's complaints as follows:

> Mrs. Gordon stated that in January 2005 while Mr. Williams was in the Dominican Republic that he called her. According to Melony, this was what he said: "Melony, I had a dream about you last night and you sure wore me out. You look good without your clothes on. I hope to have another dream about you tonight." Melony stated that she always considered John like a father and was shocked that he said such a thing. She also stated that it seems to her that he wants to be in close physical

[1] Ms. Crotts also claimed Mr. Williams acted inappropriately toward her. She submitted written complaints about Mr. Williams' verbal and physical conduct to her temporary agency and employer, Able Body Labor, on July 19, July 22, and July 25, 2005. Able Body Labor offered Ms. Crotts the opportunity to leave Stephens, which she declined.

> contact whenever they have a meeting and she is uncomfortable around Mr. Williams.
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> I asked why she did not say something earlier, and she told me she did not wish to lose her job. She said that she thought he was making up an excuse to come down there today. I informed her that she was mistaken on that. . . .

Mr. Clark then turned the matter over to Keith Honchell, Stephens' Vice President of Manufacturing and Mr. Williams' supervisor.

Mr. Honchell first learned of Ms. Gordon's complaint from Connie Blevins, although it is unclear when this communication occurred. He testified that he told Mr. Williams "to cease going into Kenco, that he was not to have any direct or indirect contact with [Ms. Gordon]." Mr. Honchell spoke briefly with Ms. Gordon on the phone and tried to arrange a time to meet with her. He did not recall when this conversation occurred but indicated it was before the Fourth of July because they agreed to meet after the company vacation.[2]

Stephens employees returned to work on July 11, 2005. Mr. Honchell met with Mr. Williams on July 12, 2005, and summarized the events of the meeting in a memorandum. The memo quotes Ms. Gordon's version of the phone call as reported to Jim Clark and then reads:

> John's response was, that he did make the call to talk about the workload at Kenco and in the conversation he did tell Melony he had a dream about her and it was a good one. John stated that in the nine-year relationship, Melony had shared many of her personal family problems and female health problems.
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> John's feelings were that they had talked and joked openly and this was nothing more or less than a passing humourous moment in the middle of a conversation that went on for some period of time.

Both men signed the document with Mr. Williams acknowledging that he concurred with the above statements.

Mr. Honchell did not meet with Ms. Gordon to discuss the situation until July 14, 2005. During this meeting, he told Ms. Gordon that Mr. Williams admitted he made a mistake and suggested they have a face-to-face meeting to try to work through the problems. Ms. Gordon declined the proposed solution. Mr. Honchell asked Ms. Gordon to submit a formal complaint which she did via letter on July 15, 2007. In the letter, Ms. Gordon stated she was looking for other employment and requested a lay off as she "[didn't] know what else to do."

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[2] Stephens closes each year for a company-wide vacation the week of the Fourth of July.

According to Ms. Gordon, Mr. Williams was present at the Kenco facility every day beginning July 15, 2005. Although the two did not communicate on these days, Ms. Gordon felt uncomfortable due to his constant presence. It appears Stephens management had no further contact with Ms. Gordon about her complaint until she resigned from the company on Friday, July 29, 2005, by sending the following letter to Keith Honchell and Stephens' President Walter Marianelli via company mail:

> I regret that I must resign my position. I am simply unable to cope with the effects of sexual harassment and Mr. Williams' continued presence. I would ask that if any employers call for a reference that you would speak kindly of my performance and/or give dates of employment. Except for the sexual harassment and handling of my report I enjoyed my years with WE Stephens.

Stephens management did not receive notice of Ms. Gordon's resignation until Monday, August 1, 2005.

Ms. Gordon filed the instant action against Stephens on August 11, 2005, claiming sexual harassment in violation of the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq*. She claimed Mr. Williams' actions created a hostile work environment.[3] Stephens denied the claims and asserted a number of defenses including the *Faragher/Ellerth* affirmative defense discussed in detail below.

The parties' cross motions for summary judgment were denied, and the case was tried before a jury on April 23 through 25, 2007. Following Ms. Gordon's case in chief, Stephens moved for a directed verdict arguing she failed to meet her burden of proving sexual harassment, of proving Stephens had notice of the harassment, and of proving Stephens failed to take prompt and corrective action in response. The trial court took the motion under advisement and proceeded with the trial. Following defendant's proof, Stephens renewed its motion for directed verdict which the court granted and dismissed Ms. Gordon's case.[4]

On appeal, Ms. Gordon challenges the validity of the pattern jury instructions on sexual harassment alleging the court was guided by a misstatement in the instructions of the liability standards regarding supervisory sexual harassment and granted the directed verdict as a result. We note at the outset that the Tennessee Pattern Jury Instructions are not mandatory authority. *Davenport v. Bates*, No. M2005-02052-COA-R3-CV, 2006 WL 3627875, *11 (Tenn. Ct. App. Dec. 12, 2006) (citing *Cortazzo v. Blackburn*, 912 S.W.2d 735, 740 (Tenn. Ct. App. 1995)). Neither the General Assembly nor the Supreme Court has approved the suggested instructions, and they should be used only after careful analysis by the trial court. *State v. Hodges*, 944 S.W.2d 346, 354 (Tenn.

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[3] Ms. Gordon did not assert a cause of action against Mr. Williams individually.

[4] The trial court made no findings of fact or credibility determinations and stated no basis for granting the directed verdict either from the bench or in the order filed May 10, 2007.

1997). Since the trial court granted a directed verdict, we need not address the jury instructions. The scope of our review is limited to a determination of whether a directed verdict was appropriate in this case as governed by applicable law.

ANALYSIS

Ms. Gordon asserted a claim under the Tennessee Human Rights Act (THRA) which provides that "[i]t is a discriminatory practice for an employer to . . . [f]ail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin[.]" Tenn. Code Ann. § 4-21-401(a)(1) (2005). Title VII of the Civil Rights Act of 1964 established such discrimination as an unlawful employment practice. 42 U.S.C. § 2000e-2(a)(1). The THRA is intended to be interpreted coextensively with Title VII. *Parker v. Warren County Util. Dist.*, 2 S.W.3d 170, 172 (Tenn. 1999). Both the federal and state acts allow claims based on the existence of a hostile work environment. *See Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 31 (Tenn. 1996).

There are different elements of proof in coworker harassment cases and supervisor harassment cases. It is undisputed that the alleged harasser, Mr. Williams, was Ms. Gordon's supervisor.[5] The companion cases of *Faragher v. City of Boca Raton*, 524 U.S. 775, 765 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 807 (1998), held that an employer will be subject to vicarious liability for a supervisor's sexual harassment of a subordinate employee and established an affirmative defense to liability in certain circumstances. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137 (2004).

The *Faragher/Ellerth* affirmative defense was adopted by the Supreme Court of Tennessee in *Parker v. Warren County Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999), and is summarized as follows:

> [U]nder the THRA, an employer is subject to vicarious liability to a victimized employee for actionable hostile work environment sexual harassment by a supervisor with immediate (or successively higher) authority over the employee. The defending

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[5] To prevail on a hostile work environment claim when a coworker is the alleged harasser, an employee must assert and prove:

> (1) the employee is a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment; (3) the harassment occurred because of the employee's gender; (4) the harassment affected a 'term, condition, or privilege' of employment; and (5) the employer knew, or should have known of the harassment and failed to respond with prompt and appropriate corrective action.

Campbell, 919 S.W.2d at 31 (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir.1986)). Ms. Gordon's assignment of error rests on the trial court's consideration of the notice feature in the final element of proving coworker sexual harassment. *See Campbell*, 919 S.W.2d at 31. As stated, we review the propriety of the directed verdict under supervisor sexual harassment standards which do not contemplate the requirement of notice apart from considering whether an employee's response to preventive and corrective measures was reasonable.

> employer may raise an affirmative defense to liability or damages when no tangible employment action has been taken. The affirmative defense is comprised of two necessary elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or that the employee unreasonably failed to otherwise avoid the harm. The affirmative defense shall not be available to the employer when the supervisor's sexual harassment has culminated in a tangible employment action.

Parker, 2 S.W.3d at 176.

The Tennessee Supreme Court recently examined the analytical framework for establishing hostile work environment sexual harassment claims and an employer's assertion of the *Faragher/Ellerth* affirmative defense in *Allen v. McPhee*, 240 S.W.3d 803 (Tenn. 2007), which guides our analysis today.

Evidence of Sexual Harassment

In order to establish a hostile work environment, Ms. Gordon must first show harassing behavior by her supervisor that was "sufficiently severe or pervasive 'to alter the conditions of [her] employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). While there can be no uniform definition of sexual harassment, it can include unwelcome sexual advances, requests for sexual favors, or any unwelcome conduct, whether verbal or physical, which would not likely take place but for the plaintiff's gender. *Campbell*, 919 S.W.2d at 31; *see also* T.P.I. 11.57(e). The harassing conduct need not be clearly sexual in nature. *Campbell*, 919 S.W.2d at 32. "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult'. . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' . . . Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 144 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (quoting *Vinson*, 477 U.S. at 65).

In this case, Mr. Williams clearly exhibited inappropriate conduct of a sexual nature when he disclosed his dream to Ms. Gordon in the January 2005 telephone call. In the months following the call, Mr. Williams started visiting the Kenco plant and Ms. Gordon more frequently. While the work in the quality control department required close inspection of garments in close proximity to other workers, once Mr. Williams made the phone call, his in-office touching and conduct took on a new connotation. It was Mr. Williams who changed the work environment and the once-friendly relationship shared with Ms. Gordon. We find the testimony of Ms. Gordon's attempts to create barricades around herself in order to keep Mr. Williams away and his continued touching and comments, which continued after she complained to Stephens, is evidence from which the jury could reasonably infer supervisor sexual harassment sufficiently severe and pervasive to create a hostile work environment.

Tangible Employment Action

Having determined there is sufficient evidence of sexual harassment in the record to create a jury question, we next address the evidence as to whether the harassment "culminate[d] in a tangible employment action, such as discharge, demotion, or undesirable reassignment," thereby subjecting Stephens to strict liability. *Ellerth*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 808; *Parker*, 2 S.W.3d at 176. An employer may not assert the *Faragher/Ellerth* affirmative defense if a supervisor's official act amounts to a tangible employment action. If no tangible employment action is taken against the victimized employee, the employer may assert an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. *Parker*, 2 S.W.3d at 176.

Ms. Gordon urges this court to expressly adopt the United States Supreme Court's definition of "tangible employment action" as stated in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), to include an employee's reasonable resignation. The *Suders* Court held that a constructive discharge can constitute a tangible employment action precluding an employer from asserting the affirmative defense. *Suders*, 542 U.S. at 134. Specifically, an employer will be charged with a tangible employment action if the plaintiff's resignation is a "reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." *Id.* We note that Ms. Gordon did not allege constructive discharge as an independent cause of action in violation of the THRA or Title VII, as did the plaintiff in *Suders*. Instead, Ms. Gordon contends her resignation was tantamount to a constructive discharge for the purpose of showing the events leading to her resignation qualify as tangible employment action(s). In keeping with the General Assembly's stated purpose that the THRA prohibit discrimination consistent with federal civil rights laws, we hold that, in certain circumstances, an employee's reasonable resignation can be a "tangible employment action" and hereby adopt *Suders* to that extent under the THRA. *See* Tenn. Code Ann. § 4-21-101(a)(1)-(2).

It is undisputed that Ms. Gordon had supervisory duties over the temporary employees at the Kenco facility and was responsible for signing their time cards. It is also undisputed that these duties were reassigned in late June 2005 after she complained to Stephens. Ms. Gordon's pay did not change. Ms. Gordon also presented evidence that her workload unreasonably fluctuated in July 2005. Beginning on July 26, 2005, the temporary employees at Kenco were directed to report to work at the Nashville facility while Ms. Gordon remained at the Kenco facility. Ms. Gordon testified that she was then given an excessive amount of work to process by herself, a job normally done by someone at the Nashville facility. Ms. Gordon enlisted her husband to help her sort through the boxes of garments; the two worked throughout the weekend to complete the task. Ms. Gordon contends Stephens' actions of removing her supervisory duties and subsequently "bombarding" her with work constitute tangible employment action that reasonably resulted in her resignation.

While it was not unusual for the workload at Stephens to ebb and flow, a reasonable person could find that the transfer of temporary help just before a surge in work was an authorized or intentional act. Likewise, it is not unreasonable to conclude that the removal of Ms. Gordon's

supervisory duties was "a humiliating demotion." *See Suders*, 542 U.S. at 133. The change in Ms. Gordon's duties happened almost immediately after she complained. Moreover, the temporary employees that used to answer to her were instructed to report to someone else, so the change was a known fact. We do not express an opinion as to whether or not Ms. Gordon suffered a tangible employment action; we simply find that reasonable minds could reach different conclusions on this question based on the evidence in the record.

Faragher/Ellerth **Affirmative Defense**

Because reasonable minds could also conclude that Stephens took no tangible employment action against Ms. Gordon, we consider whether Stephens proved the elements of the *Faragher/Ellerth* affirmative defense by evidence that, when viewed in Ms. Gordon's favor, supports but one conclusion. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765.

a. Reasonableness of Stephens' Preventive and Corrective Measures

An employer must exercise reasonable care to prevent sexual harassment before it occurs, *Faragher*, 524 U.S. at 807, and bears the burden of establishing it exercised that care. *Parker*, 2 S.W.3d at 177. "[T]he presence of a properly disseminated, written anti-harassment policy is relevant to the determination of whether an employer exercised reasonable care [to prevent harassment]." *Allen*, 240 S.W.3d at 816 (citing *Parker*, 2 S.W.3d at 177). Guided by a survey of federal cases, the *Allen* court stated:

> It is widely accepted that the existence of an anti-harassment policy weighs heavily in favor of a conclusion that an employer has exercised reasonable care to prevent harassment. The mere existence of an anti-harassment policy, however, does not conclusively establish that an employer has taken reasonable steps to prevent sexual harassment. On the contrary, an employer has the burden of establishing that anti-harassment policies are "reasonably designed and reasonably effectual." An employer may meet this burden by demonstrating that its anti-harassment policy is reasonably published, contains reasonable complaint procedures, and is not otherwise defective.

Id. (quoting *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (internal citations omitted)).

Ms. Gordon argues that Stephens could not satisfy its burden of proving the affirmative defense because it failed to employ the minimum preventative measures adopted by the court in *Mays v. Music City Record Distribs., Inc.*, No. M2006-00932-COA-R3-CV, 2007 WL 2198240 (Tenn. Ct. App. July 27, 2007) (no Tenn. R. App. P. 11 application filed):

> While there is no exact formula for what constitutes a "reasonable" sexual harassment policy, an effective policy should at least: (1) require supervisors to report incidents of sexual harassment, *see Varner v. Nat'l Super Markets, Inc*. 94 F.3d 1209, 1214 (8th Cir.1996); (2) permit both informal and formal complaints of harassment to be made, *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 (10th Cir.1998); (3) provide a mechanism for bypassing a harassing supervisor when making a complaint, *Faragher*, 524 U.S. at 808, 118 S.Ct. 2275; and (4) and provide for training regarding the policy, *Wilson*, 164 F.3d at 541.

Mays, 2007 WL 2198240, at *5 (quoting *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th 2005)). The *Allen* court likewise addressed the general requirement that anti-harassment policies explain "clear complaint procedures that permit an employ[ee] to bypass a harassing supervisor" stating:

> Employees would be understandably reluctant to come forward with sexual harassment complaints if they were forced to seek assistance from their harassers. Complaining to a harassing supervisor could reasonably be expected to be futile and could potentially expose the complainant to an increased level of harassment. Employers have a duty to provide reasonable avenues for reporting sexual harassment policies in such a way that employees are not put in this vulnerable position.

Allen, 240 S.W.3d at 817 (citing *Faragher*, 524 U.S. at 808).

Stephens contends the policies and procedures outlined in its operating manual clearly define sexual harassment and adequately inform supervisors and managers that it is not be tolerated. However, the operating manual was given only to management; employees were given a separate manual at the start of their employment. Stephens' corporate sexual harassment policy, which is the more detailed policy, appears in a section of the operating manual titled "Hourly Personnel Policy Manual." The corporate policy reads in pertinent part:

> 1. Harassment on the basis of sex will not be tolerated by the Company. Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature by an employee constitutes sexual harassment when:
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> (a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
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> (b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
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> (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

> 2. Employees who feel they have been the subject of sexual harassment should report the matter immediately to their supervisor or Manager. The matter will be investigated fully.

Stephens' employees are given a 36-page handbook when they begin working for the company. The employees receive a new version only if the handbook is reprinted or updated. The most recent employee handbook that was given to Ms. Gordon was printed in September 1995, just one year after she started working for Stephens and ten years before the events at issue.[6] The sexual harassment policy appearing in the employee manual reads as follows:

> Protection Against Sexual Harassment – Sexual harassment which interferes with an individual's work performance or creates an offensive working environment is prohibited. If you feel that you are being sexually harassed, please report the matter to your supervisor or manager immediately. The matter will be fully investigated. The Company [Stephens] will guard the privacy of the employee during its investigation.

The manual also outlines a general procedure for reporting employee grievances. This "open door" policy encourages employees to first report their complaint to their immediate supervisor, then to their manager, next to the vice president of manufacturing, and finally to the president of the company. However, employees are given no specific instructions for reporting claims of sexual harassment and no definition of sexual harassment appears in the book.[7]

Additionally, Ms. Gordon presented expert testimony that an effective sexual harassment policy should have a provision requiring supervisors to report harassment, a clear definition of sexual harassment, a non-retaliation provision, procedures for disciplining or discharging offenders, and a bypass provision naming a contact person. Likewise, companies should educate and train their employees on that sexual harassment policy. Stephens does not provide or require sexual harassment training for its managers, supervisors, or employees. Stephens' policy found in the employee handbook does not contain any of the above-mentioned provisions, and Stephens provided no training on its policy.

Based on the evidence at trial and review of the policy in *Allen*, we find reasonable minds could reach different conclusions as to the effectiveness of Stephens' sexual harassment policy. We find it difficult to view a more than ten-year-old sexual harassment policy with no definition of sexual harassment, no outlined procedure of how complaints will be processed, and no alternative

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[6] Ms. Gordon requested a copy of Stephens' employee handbook on July 15, 2005, because she could not locate her copy.

[7] Stephens admitted into evidence a copy of a poster entitled "Sexual Harassment is Illegal" which named Jim Clark as the contact person for reporting harassment claims or issues. However, Ms. Gordon contends she had never seen the poster in the 10 years she worked for Stephens. It appears the poster was not displayed at the Kenco facility where she worked but was posted at corporate headquarters in Nashville.

or "bypass" provision describing the process in the event a supervisor or manager is the harasser, as a reasonable effort to prevent harassment. Ms. Gordon was understandably reluctant to report the sexual harassment when the only procedure Stephens' policy provides instructs her to report harassment "to your supervisor or manager[,]" in this case, the very person responsible for the alleged harassment. Moreover, she was afraid of losing her job and the stated policy offers no reassurance against retaliation or guarantee that she would not lose her job for reporting the harassment.

Nevertheless, there was also evidence from which it could be inferred the policy reasonably prevented sexual harassment. There was testimony that Ms. Gordon's was the first complaint of sexual harassment at the company, which was established in 1923. And Ms. Gordon did in fact decide to report the harassment and reported it to Mr. Clark, the supposed contact for reporting such claims. The reasonableness of Stephens' sexual harassment policy is a determination to be made by the fact finder.

We next examine the reasonableness of Stephens' corrective measures. "[T]he duty to correct sexual harassment requires an employer to take reasonable steps to end and investigate alleged harassment." *Allen*, 240 S.W.3d at 815. To make a fair and truthful assessment of what occurred, an employer may be required to conduct an informal inquiry or, based on the circumstances of the case, a more involved investigation may be warranted. *Id*. (citing *Baldwin v. Blue Cross/Blue Shield of Ala.*, 430 F.3d 1287, 1304 (11th Cir. 2007)). An employer's corrective measures are primarily found to be inadequate when the alleged harasser is not disciplined and the harassment is allowed to continue. *Id*. (citing *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 511 (6th Cir. 2001)). Of course, disciplinary action against the alleged harasser is not always warranted and is not a precursor to avoiding liability. *Id*. at 815 n.4.

Stephens contends that its corrective measures were effective because Ms. Gordon and Mr. Williams did not have actual physical contact with one another after Ms. Gordon complained on June 28, 2005, and that this separation eliminated the alleged harassing behavior. However, it is undisputed that Mr. Williams was working at the Kenco facility every day beginning the week of July 20, 2005, until Ms. Gordon's resignation on July 29, 2005. There was evidence indicating Mr. Williams continued his behavior after Ms. Gordon complained. Arguably, Stephens' corrective measures were ineffective. Furthermore, while Mr. Williams considered the memo and meeting with Mr. Honchell as disciplinary in nature, a reasonable juror could find that he was not disciplined for his behavior. There was no documentation or record that Mr. Williams was reprimanded for his conduct or told that Stephens disapproved of such behavior. The memo he signed merely documented his response to Ms. Gordon's allegations. We credit Stephens with quickly responding to Ms. Gordon's complaints, however, it is undisputed that the investigation was not completed when Ms. Gordon resigned a month later. As stated above, we find that a jury could reach different conclusions as to the reasonableness of Stephens' preventive and corrective measures; therefore, the trial court's grant of a directed verdict was in error.

b. Reasonableness of Gordon's Failure to Take Advantage of Stephens' Preventive and Corrective Measures

The second prong of the *Faragher/Ellerth* affirmative defense requires the employer to prove that Ms. Gordon unreasonably failed to take advantage of Stephens' preventive and corrective measures. We need not address this issue having determined that reasonable minds could differ regarding the reasonableness of Stephens' preventive and corrective measures. An employer is required to prove both elements of the defense in order to avoid liability. The issue is to be determined by the trier of fact if reached after resolution of the above issues.

CONCLUSION

After careful review of the evidence presented at trial, drawing all reasonable inferences in favor of Ms. Gordon's position, we find there was insufficient evidence to support a directed verdict because reasonable minds could differ as to the issues in the plaintiff's prima facie case and in defendant's affirmative defense. We vacate the directed verdict granted in favor of the defendant and remand for further proceedings. Costs of appeal are assessed against Appellee W. E. Stephens Manufacturing, Inc. for which execution, if necessary, may issue.

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ANDY D. BENNETT, JUDGE